

1
2
3
4
5
6 UNITED STATES DISTRICT COURT FOR THE
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 UNITED STATES OF AMERICA,

10 Plaintiff,

11 v.

12 MARK F. SPANGLER,

13 Defendant,

NO. CR12-133RSM

ORDER

14
15 Before the Court is the government's Motion for Preliminary Ruling on Attorney-
16 Client Privilege, pursuant to Federal Rule of Evidence 104. Having considered the
17 Motion, the parties' subsequent filings, and the parties' previous filings and argument
18 regarding the attorney-client privilege, the Court enters the following Order:

19 1. As of June 28, 2011, the receiver for The Spangler Group (TSG) and
20 certain TSG entities, KLJ Consulting, held the attorney-client privilege as to the
21 following TSG entities: The Spangler Group; SG Growth+; SG Income +; Spangler
22 Ventures 7; Spangler Ventures 9; Spangler Ventures 11; Equity Investors, LLC; Income
23 +, LLC; and TeraHop. Through counsel, Andrea Orth and Tom Bucknell, the receiver
24 has waived the attorney-client privilege as to these entities. Courts have uniformly held
25 that a receiver, like a trustee, controls the attorney-client privilege for the entities under
26 its control. *See Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343
27 (1985); *United States v. Plache*, 913 2d 1375 (9th Cir. 1990). This waiver extends to the
28

1 entire subject matter of the representation, including communications regarding
2 predecessor entities. Accordingly, the government may review any communications
3 between Mark Spangler, or other members of The Spangler Group, and any attorneys for
4 these entities.

5 2. Defendant Spangler has failed to carry his burden of establishing that any
6 of the attorneys in question (that is: William Carleton, John Stokke, Joe Wallin, Keith
7 Baldwin, and their respective firms) who represented the relevant Spangler Group entities
8 also represented him in an individual capacity. Namely, Defendant Spangler has failed to
9 produce evidence that meets the five-part *Bevill* test adopted by the Ninth Circuit in
10 *United States v. Graf*, 610 F.3d 1148 (9th Cir. 2010). Most notably, Defendant Spangler
11 has failed to meet the following factors: *Bevill Factor # 2*: when he approached these
12 attorneys or firms, he did not make it clear that he was seeking legal advice in his
13 individual, rather than his representative, capacity; *Bevill Factor #3*: he did not
14 demonstrate that the counsel saw fit to communicate with him in his individual capacity,
15 knowing that a possible conflict could arise; *Bevill Factor #5*: he did not show that the
16 substance of his conversations with counsel did not concern matters within the company
17 or the general affairs of the company.

18 3. Even if Defendant Spangler somehow possessed a privilege with respect to
19 the documents or testimony in question, he categorically failed to take any reasonable
20 steps to preserve the confidential or privileged nature of those documents or testimony.
21 Defendant Spangler himself made the determination to place the Spangler Group entities
22 into receivership. He then voluntarily turned over the Spangler Group's computer server
23 to the receiver. In doing so, Defendant Spangler made no meaningful effort to preserve
24 the privileged or confidential nature of any materials on the server.

25 4. As to the attorneys for the Davis, Wright law firm, Keith Baldwin and Joe
26 Wallin:
27
28

1 (a) As of June 28, 2011, the receiver held and continues to hold the
2 privilege as to these attorneys and their work on the TSG entities set forth in
3 paragraph one, above;

4 (b) The receiver waived the privilege as to communications between
5 these attorneys and Mark Spangler;

6 (b) To the extent that defendant Spangler held any privilege as to these
7 attorneys, Spangler had ample opportunity to assert a privilege with respect to the
8 government's interview of the Davis, Wright attorneys, but chose not to do so;

9 (c) Defendant Spangler also had ample opportunity to assert a privilege
10 as to any Davis, Wright documents that had been provided to the government, but chose
11 not to do so;

12 (d) By failing to protect any privileged documents or communications,
13 Defendant Spangler failed to preserve a claim of privilege.

14 In light of these facts, the government may continue to review the Davis, Wright
15 documents and interview these lawyers, if necessary. Also, the government may
16 introduce documents obtained from Davis, Wright at trial, and call the Davis, Wright
17 attorneys as witnesses at trial, without contravening any attorney-client privilege owed to
18 Defendant Spangler, because the privilege has been waived.

19 5. As to attorney William Carleton:

20 (a) As of June 28, 2011, the receiver held and continues to hold the
21 privilege as to Mr. Carleton and his work on the TSG entities set forth in paragraph one,
22 above;

23 (b) The receiver waived the privilege as to communications between this
24 attorney and Mark Spangler;

25 (b) To the extent that defendant Spangler held any privilege as to Mr.
26 Carleton, Spangler had ample opportunity to assert a privilege with respect to the
27 government's interview of Mr. Carleton, but chose not to do so;

1 (c) Defendant Spangler also had ample opportunity to assert a privilege
2 as to any Carleton documents that had been provided to the government, but chose not to
3 do so;

4 (d) By failing to protect any privileged documents or communications,
5 Defendant Spangler failed to preserve a claim of privilege.

6 In light of these facts, the government may continue to review the documents
7 related to William Carleton, may interview Mr. Carleton, and may call him as a witness
8 at trial, without contravening any attorney-client privilege owed to Defendant Spangler,
9 because the privilege has been waived.

10 6. As to attorney John Stokke, the government may interview Mr. Stokke and
11 ask him questions regarding documents and communications relating to the entities in
12 paragraph one of this Order. Counsel for the defendant shall be afforded an opportunity
13 to be present for this interview.

14 //

15

16 //

17

18 //

19

20 //

21

22 //

23

24 //

25

26 //

27

28 //

7. By no later than Friday, July 19, 2013 the defendant must either waive any claim of privilege or provide a detailed privilege log as to communications between defendant Spangler and attorneys for the McNaul, Ebel firm. Also by this date, the defendant has the burden to show that he has met the *Bevill* test as to these attorneys, in order to sustain a claim of privilege. If the defendant elects to produce a privilege log, the log shall:

- (a) Identify the nature of the statement, communication, document or information claimed to be privileged;
- (b) Describe the subject matter with sufficient particularity to allow the Court to rule on the asserted privilege;
- (c) Identify the date of the statement, communication, document or information claimed to be privileged; and
- (d) Identify the names of the persons identified or referenced in the statement, communication, document, or information as well as any other persons indicated as having been provided a copy thereof.

SO ORDERED this 20th day of June 2013.

[Signature]

RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

PRESENTED BY:

/s/ *Mike Lang*

MIKE LANG

CARL BLACKSTONE

FRANCIS FRANZE-NAKAMURA

Assistant United States Attorneys